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# The Louisiana Criminal Code

## MAKING THE PUNISHMENT FIT THE CRIMINAL

DONALD V. WILSON\*

My object all sublime  
I shall achieve in time—  
To let the punishment fit the crime—  
The punishment fit the crime.  
(*The Mikado*)

Undoubtedly the adoption of the new Louisiana Criminal Code<sup>1</sup> prepared by the Louisiana Law Institute was a definite step toward achieving the "sublime" object of fitting the punishment to the crime in the substantive criminal law of the state. The new Code properly emphasizes the definition of crime and provides a necessary flexibility of punishment. There is a further recognition of the humane policy that penalties for crimes are to be considered not only as punishment, but also as a method of protecting society and reforming the criminal.<sup>2</sup> Although the new Code of substantive criminal law fits the punishment to the crime, it does not purport to deal with the equally important problem of individualization and reformation of the criminal.<sup>3</sup> Additional laws are needed to regulate the treatment of the individual found guilty of crime under the carefully written provisions of the new Criminal Code.

In order to protect society some method must be followed in controlling criminals and frequently they must be incarcerated. The period of incarceration must, of course, be related to the crime committed, but if the state hopes to achieve anything in addition to punishment, the period of incarceration must also be related to the criminal and particularly to the possibility of his reformation. Since relatively few prisoners die in prison, most of

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1. La. Act 43 of 1942.

2. Schwenk, *Criminal Codification and General Principles of Criminal Law in Argentina, Mexico, Chile, and the United States: A Comparative Study* (1942) 4 LOUISIANA LAW REVIEW 351, 373.

3. Criminal codes do provide to some extent for "individualization of punishment" by providing for different kinds and lengths of punishment for various criminal acts. See Glueck, *Crime and Justice* (1936) 223.

the persons who are convicted and incarcerated return eventually to society. If society is to be protected from further criminal activity by these persons, it is necessary that something be done to ensure that they will avoid criminal activity in the future. Experience has indicated that punishment through incarceration is not by itself a successful deterrent to future crimes. In order to avoid the costly procedure of arresting and convicting the same persons repeatedly, attention must be given to what happens to them after their first conviction. It is not possible, nor is it desirable, to put every person convicted of crime into a penal institution and keep him there for the balance of his life. The prisoner is coming home some day (except for the small percentage who die in prison); therefore it becomes necessary to determine when and under what circumstances he should return. Also, further consideration must be given to the question of whether the guilty person need be incarcerated in the first place, and whether society can be protected adequately by allowing him to live outside an institution under conditions imposed by the court.

Apparently, the purpose of criminal law is to punish the convicted person and to protect society by his incarceration and rehabilitation. These objectives may be attained in some cases by placing the guilty person under the custody of the court, so that his future conduct may be restrained and supervised by a representative of the court. In other cases it is advisable that the guilty person be restrained by commitment to a parish jail, a district or parish prison farm, or the state penitentiary.

When criminal laws are based entirely upon the premise that their purpose is to punish the wrongdoer, it is to be expected that little attention will be given to what happens to the offender after he has been held guilty. When it is recognized, however, that rehabilitation of the wrongdoer is a sound investment, then new features are introduced into the criminal law. It is difficult to write laws which satisfy the demands that the criminal be punished, removed from society and rehabilitated all in the same process. Previous Louisiana legislatures had acknowledged the wisdom of rehabilitation by providing for parole and suspension of sentence. Perhaps the idea of punishment through incarceration remains predominant, but the social value of giving the criminal an opportunity to live and support himself outside a penal institution is given new and greater recognition by laws adopted by the 1942 legislature.

Before the 1942 legislature convened it was recognized that many difficulties inherent in our criminal laws would not be elim-

inated by the proposed Criminal Code of the substantive criminal law of the state. Although suspension of sentence has been possible in Louisiana since 1914 and was incorporated in the Code of Criminal Procedure adopted in 1928, no changes had been made in this law. The statutes concerning habitual criminals, release through parole or good conduct, had not been included in the Code of Criminal Procedure or the proposed codification of the substantive criminal law. These laws had been passed by the state legislature several years ago and subsequent amendments had tended toward confusion rather than clarification. Early in 1942 Governor Jones, being aware of these problems, appointed a committee of judges, lawyers, and other interested citizens to draft revisions of the laws governing the incarceration and release of persons found guilty of crime.<sup>4</sup> The following comments point out some of the difficulties and inconsistencies in the previous statutes, summarize what was done by the 1942 legislature to remedy these difficulties,<sup>5</sup> and suggest additional changes which might be made to improve further this phase of criminal law and procedure.

#### SUSPENDED SENTENCE AND PROBATION

Prisons must be used as a place of custody for dangerous criminals, but it is becoming more apparent that they fail as a means of rehabilitation. Unfortunately, many criminals serve sentences in prison only to come out worse social misfits than when they entered. Recognizing this fact, most states have enacted statutes which authorize courts to suspend the imposition of sen-

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4. This committee consisted of Warren Doyle, New Orleans; Griffin Hawkins, Lake Charles; Judge Charles Holcombe, Baton Rouge; Judge William O'Hara, New Orleans; Judge John R. Pleasant, Shreveport; Senator Grove Stafford, Alexandria; Eugene Stanley, Attorney General; and Judge Frank Voelker, Lake Providence.

After the first meeting of the committee in January 1942, a group of statutes were drawn up by an informal drafting committee of interested persons who had been working with the laws. The proposed laws were approved by the committee at a second meeting in April 1942 and were introduced in the legislature by Representative Arthur Watson of Natchitoches. The "drafting committee" consisted of Professor Dale Bennett, Louisiana Law Institute and Louisiana State University; Mr. G. F. Provost, Louisiana State Penitentiary; Mr. William E. Davidson, Supervisor of Parole, Department of Public Welfare; Mr. Duncan Kemp, Attorney, Department of Public Welfare; and Donald V. Wilson, Department of Public Welfare.

5. The seven acts passed by the state legislature in 1942 considered in this article are Act 44, Parole (repeals Act 331 of 1926); Act 45, Habitual Criminals (repeals Act 15 of 1928); Act 46, Determinate Sentence (amends Article 529 of the Code of Criminal Procedure); Act 47, Information concerning prisoners; Act 48, Suspended Sentence—Misdemeanors (amends Articles 536, 537 and 538 of the Code of Criminal Procedure); Act 49, Probation—Felonies (amends Articles 530, 531, 532, 533, 534 and 535 of the Code of Criminal Procedure); Act 50, Good-time Law (repeals Act 311 of 1926).

tences or the execution of sentences imposed. Although no complete statistics on the subject are available, it has been estimated that approximately one-third of all offenders found guilty and sentenced by state and federal courts are placed on probation or given suspended sentence.<sup>6</sup> Economic loss to the community is avoided by the use of suspended sentence when the protection of society does not require incarceration. Most suspended sentence statutes empower the court to impose conditions to be observed by the offender. Violation of such conditions authorizes the court to revoke the suspension.

The offender granted a suspended sentence is usually placed on probation under the supervision of a probation officer. "Probation seeks to accomplish the rehabilitation of persons convicted of crime by returning them to society during a period of supervision rather than by sending them into the unnatural and, all too often, socially unhealthful atmosphere of prisons and reformatories."<sup>7</sup> Although probation laws and administrative practices have many shortcomings, the advantages of probation as an aid to crime prevention and rehabilitation of offenders exceed the defects. Probation is a method of discipline and treatment when probationers are carefully chosen and the supervisory work is performed with intelligence. Rehabilitation of the criminal is frequently effected in cases where incarceration in a penal institution would only result in aggravating the anti-social attitude and in further economic loss to the state. The principles of probation are sound and its use should be extended.<sup>8</sup>

#### *Granting Suspended Sentence and Supervision*

Under the Louisiana law different requirements have been established concerning the suspension of sentence for misdemeanants and felons.<sup>9</sup> The district courts have been authorized since 1914 to suspend sentence in felony cases, except for certain crimes<sup>10</sup> when the jury found that the defendant had not previously been convicted of a felony and recommended that the sentence be suspended. It was not mandatory that the judge suspend

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6. 2 Attorney General's Survey of Release Procedures, Probation (Washington, 1939) 38.

7. *Id.* at 1.

8. *Id.* at 471.

9. Arts. 530-538, La. Code of Crim. Proc. of 1928. These nine articles of the Code are exactly the same as the wording of the nine sections of Act 74 of 1914. Although suspension of sentence has been possible in Louisiana for twenty-eight years no changes in the law were made until 1942.

10. Sentence could not be suspended for the crimes of "murder, rape, perjury, burglary of a dwelling, robbery, arson, incest, bigamy, abortion and assault with intent to rape."

the sentence although it might be recommended by the jury.<sup>11</sup> In misdemeanor cases tried without a jury, the judge could suspend a sentence if he found that the defendant had not been previously convicted of a felony or misdemeanor,<sup>12</sup> but the judge could not suspend the sentence in misdemeanor cases tried by a jury unless the suspension was recommended by the jury.<sup>13</sup> In felony cases and in misdemeanor cases tried by a jury, the court was required to permit testimony concerning the general reputation of the defendant.<sup>14</sup> In misdemeanor cases tried without a jury the judge might consider an application for suspension of sentence before or after conviction.<sup>15</sup>

Although the sentence was suspended the court was required to impose a sentence and suspend it during the "good behavior" of the defendant.<sup>16</sup> Good behavior was defined as not being convicted of any felony during the period of the suspended sentence.<sup>17</sup>

The state legislature in 1942 adopted two statutes changing the requirements for granting suspended sentence to persons guilty of misdemeanors and felonies. The new law concerning the suspension of the sentence in misdemeanor cases<sup>18</sup> is very similar to the previous requirements of the Code of Criminal Procedure. As introduced, the bill authorizing suspension of sentence in misdemeanor cases provided for the imposition of conditions by the court. This provision of the law was unfortunately deleted by the House Committee. The effect of this omission is that "good behavior" merely means that a misdemeanant receiving a sus-

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11. *State v. Evans*, 159 La. 712, 106 So. 123 (1925).

12. Art. 536, La. Code of Crim. Proc. of 1928.

13. *State v. Plummer*, 153 La. 730, 96 So. 548 (1923).

14. See *State v. Garland*, 140 La. 401, 73 So. 246 (1916), where it was held that the court is allowed to suspend sentence only after testimony is heard. See also *Perez v. Mereaux*, 195 La. 987, 197 So. 683 (1940).

15. *State v. Serio*, 138 La. 678, 70 So. 609 (1916); *State v. Defatta*, 138 La. 1092, 71 So. 195 (1916).

It had previously been held by the Louisiana Supreme Court that the judge has no right to order a prisoner's discharge from jail, while serving a sentence which had not been suspended. Where a sick prisoner cannot be properly cared for in a local jail the district judge may place him elsewhere for treatment. *Saint v. Mereaux*, 163 La. 242, 111 So. 691 (1927). The 1942 law provides, however, that the judge may suspend the sentence although the prisoner has been incarcerated and actually begun to serve the sentence imposed. Art. 536, La. Code of Crim. Proc. of 1928 as amended by La. Act 48 of 1942.

16. Art. 532, La. Code of Crim. Proc. of 1928.

17. A subsequent conviction of a misdemeanor may be the basis of revoking a previous suspended sentence for a misdemeanor. *State v. Marcella*, 155 La. 612, 99 So. 480 (1924).

18. La. Act 48 of 1942 which amended and re-enacted Arts. 536, 537 and 538, La. Code of Crim. Proc. of 1928.

pended sentence is to avoid being convicted of another crime during the period of suspension. It would seem that the effectiveness of the law would be improved if the court were empowered to impose conditions and to cause the revocation of the suspended sentence if it is shown by reports to the court that the conditions were subsequently violated. Such a provision would give greater protection to society, since the prisoner could then be incarcerated before another crime is committed.

In felony cases the new law,<sup>19</sup> as did the old, limits suspension of sentence to first offenders and requires the recommendation of a jury. This requirement of a jury recommendation should be given further consideration. A practical difficulty is presented when the defendant pleads guilty of a felony. In such a case a jury must be impaneled to determine whether it will recommend a suspension of sentence. This procedure, requiring a recommendation of the jury, has definite disadvantages, particularly in the rural parishes where it is difficult to impanel a jury. In the smaller parishes the suspended sentence was, of course, not used as frequently as in the larger parishes and undoubtedly in many cases the defendant was sent to prison when a suspended sentence would have been proper and possible except for the difficulty of securing a recommendation from the jury.<sup>20</sup>

The new law authorizing suspended sentence in felony cases does provide that the court may place the offender on probation on such terms and conditions as the court may deem best.<sup>21</sup> The probation bill,<sup>22</sup> as introduced, provided that the imposition as well as the execution of sentence could be suspended. The bill was amended in the House so that the judge is compelled to impose sentence, but may suspend its execution. Better results probably could be obtained if the judge were authorized to suspend the imposition of the sentence and to place the defendant on probation for a period not exceeding five years. The new Louisiana law does provide that in felony cases where probation is granted, the period of probation cannot exceed five years, but a

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19. La. Act 49 of 1942 which amended Arts. 530, 531, 532, 533 and 534 and repealed Art. 535, La. Code of Crim. Proc. of 1928.

20. A bill introduced by Representative Flowers of LaSalle Parish and passed by the legislature provides that a plea of guilty in a felony case entered within forty-eight hours after arrest and incarceration must be set aside upon motion of the accused, or his attorney, if filed within thirty days of the imposition of sentence (Act 324 of 1942). This statute will tend to prevent pleas of guilty being accepted immediately after a person has been arrested.

21. Art. 530, La. Code of Crim. Proc. of 1928 as amended by La. Act 49 of 1942.

22. House Bill 458.

sentence must be imposed. The person placed on probation is under the supervision of the Department of Public Welfare.<sup>23</sup>

The new law also provides that the judge may defer imposition of the sentence for a period not exceeding sixty days, during which time an investigation and report of the case is made by a probation officer. The report is available to the court in determining whether probation should be granted and in fixing the sentence. Future legislatures may well consider the advisability of requiring an investigation in all cases of persons found guilty of felonies when a probation officer is available to the court. An investigation by a probation officer would probably be a better basis than a jury's recommendation for determining whether the sentence should be suspended. In any case there seems to be no good reason for requiring a jury to recommend suspension of sentence for persons convicted of minor felonies—such as crimes for which the maximum penalty is less than five years. Insofar as eligibility for probation is concerned, the distinction between felonies and misdemeanors should be eliminated entirely to make probation possible for any person convicted of any crime. Such a provision was contemplated but was not considered practical at the present time because of the cost of providing adequate supervision.<sup>24</sup>

#### *Termination of Suspended Sentence*

Under the old law suspension of sentence in felony cases could be revoked when it was established that the defendant had subsequently been convicted of a felony,<sup>25</sup> while in misdemeanor cases the sentence was revocable if the defendant was subsequently convicted of a felony or misdemeanor.<sup>26</sup> Neither the ver-

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23. Supervision of probationers is the responsibility of the Division of Probation and Parole of the Department of Public Welfare and is not performed by the local welfare offices. There is, however, legal authority for courts to use local welfare directors as probation officers. See Section 10 of the Welfare Organization Act (La. Act 344 of 1938, as amended by La. Act 212 of 1940 [Dart's Stats. (1939) §§ 6537.1-6537-21]). The Probation and Parole Officers of the Division of Probation and Parole are responsible for supervising probationers and parolees in the judicial districts to which they are assigned.

24. The Appropriation Act (Act 266 of 1942) substantially increased the appropriation for the Division of Probation and Parole of the Department of Public Welfare. Although \$28,000 per year is probably sufficient for the present, this amounts to only \$2,333 per month which provides for a maximum of eight employees who will be responsible for assembling data concerning applicants for parole and supervising all persons in the state who have been released on probation or parole.

25. Art. 533, La. Code of Crim. Proc. of 1928.

26. Art. 537, La. Code of Crim. Proc. of 1928. *State v. Marcella*, 155 La. 612, 99 So. 480 (1924).



dict of conviction nor the judgment entered became final until the expiration of the sentence. At that time the defendant applied for a new trial and dismissal of the case; he was required to make an affidavit that he had not subsequently been convicted of any felony and that there was no felony charge pending against him. If the court found these facts to be true it was required to order a new trial and dismiss the case.<sup>27</sup> Proof of arrest on a subsequent charge, without conviction, did not substantiate a revocation of the suspended sentence.<sup>28</sup>

The new law provides that in felony cases the court may at any time before the expiration of the sentence terminate the probation and discharge the probationer, provided that such action is recommended by the Board of Parole. It is perhaps unfortunate that the judge cannot of his own motion terminate the probation, but the recommendation of the Board of Parole (of which the presiding judge is a member) may encourage such action particularly in those cases in which the judge hesitates to act. It is advisable that some method be established for terminating the sentence if the probationer demonstrates within a probation period that he can adjust satisfactorily. When the probationer violates the conditions of his probation the suspended sentence may be terminated by the court and the defendant committed to the penitentiary.<sup>29</sup> This decision is made by the court. The probationer is entitled to a discharge when he has served the period fixed by the court and has fulfilled the conditions of his probation. The method for terminating the suspended sentence in misdemeanor cases is the same under the new law<sup>30</sup> as the procedure required by the former statute.

#### HABITUAL CRIMINALS

Habitual criminal acts are apparently based on the theory that the criminal who has a previous record should be imprisoned for a longer period than the first offender convicted of the same crime. Such statutes are predicated upon the premise that length of sentence acts as a deterrent to crime, but it is now generally accepted that certainty of sentence is a more effective deterrent. Long periods of incarceration frequently do the criminal more harm than good. It seems advisable, however, to remove certain

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27. Art. 534, La. Code of Crim. Proc. of 1928.

28. *In re Hemler*, 157 La. 227, 102 So. 316 (1924).

29. Art. 533, La. Code of Crim. Proc. of 1928, as amended by La. Act 49 of 1942.

30. Art. 537, La. Code of Crim. Proc. of 1928, as amended by La. Act 48 of 1942.

criminals from society when it is determined from the prisoner's record that satisfactory adjustment outside an institution is highly improbable. There may be some merit, therefore, in the basic policy of allowing a longer sentence to be imposed on the prisoner who has previously been convicted of a felony.

The principal difficulty with the old Habitual Criminal Act<sup>31</sup> was the fact that it was not applied consistently and many second and third offenders were not indicted or convicted as such. It was used in some parishes but not in all cases in all parishes. When the act was invoked the multiple offender usually received an extremely long sentence and the Board of Pardons was therefore frequently called upon to grant a commutation of sentence. A real objection to the statute was the severity of the penalty which the judge was required to impose upon second and subsequent offenders. The minimum sentence which could be imposed upon the second offender was the maximum sentence for a first conviction. Such a sentence in many instances was unduly harsh. For example, the least possible sentence that could be imposed on an offender convicted for the second time of a larceny of over twenty dollars was imprisonment for ten years. A life sentence was mandatory for the individual convicted four times of a larceny of over twenty dollars. As a practical consideration, it may be difficult to secure conviction of a clearly guilty second or subsequent offender if the penalty is definitely out of proportion to the seriousness of the criminal conduct.

The purpose of the new Habitual Criminal Act<sup>32</sup> is to make the statute more usable and to aid in securing uniformity in sentencing. The minimum sentences are reduced somewhat so that there will be a greater use of the statute, and the judge will be able to impose a sentence commensurate with the facts of the case. A comparison of the sentencing provisions of the previous habitual criminal law and the 1942 statute is set forth in the following table.

The new statute is not applicable when a period of more than five years has elapsed between the expiration of the sentence imposed for the last previous felony conviction, and the time of commission of the latest felony. This provision was included in the new law since it was felt that if the defendant did not violate the law for a period of five years he was not properly classed as a

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31. La. Act 15 of 1928 [Dart's Crim. Stats. (1932) §§ 709-711].

32. La. Act 45 of 1942.

	MINIMUM SENTENCE		MAXIMUM SENTENCE	
	<i>Old Law</i>	<i>New Law</i>	<i>Old Law</i>	<i>New Law</i>
Second Offender	Maximum sentence for a first conviction	One-third of maximum sentence for a first conviction	Twice maximum sentence for a first conviction	Twice maximum sentence for a first conviction
Third Offender	Maximum sentence for a <i>second</i> conviction	One-half of maximum sentence for a <i>first</i> conviction	Four times maximum sentence for a first conviction	Twice maximum sentence for a first conviction
Fourth Offender	Natural life	Twenty years or maximum sentence for a first conviction	Natural life	Natural life

habitual offender. Hard cases in which there is a long period of years between offenses can, under the new law, be avoided.

The problem of defining which felony or felonies can be the basis for a subsequent conviction as a habitual criminal has been troublesome.<sup>33</sup> The new statute provides that a person is to be charged as a habitual criminal if he "had previously been convicted under the laws of any other state or United States or any foreign government or country of a crime which, if committed in this state, would be a felony."<sup>34</sup> There is some question as to whether a previous crime committed in another state or country can be the basis of a habitual criminal action if such crime was not classified as a felony in the state or country in which it was committed, even though it may be classified as a felony in Louisiana. The law is clear, however, that the previous felony which is the basis of the habitual criminal charge must be a felony under the provisions of Louisiana law.<sup>35</sup> The Louisiana Supreme Court has recently held that although a prior conviction in a federal court of a crime "denounced not only by the Federal law, but also

33. The previous law concerning the evidence which is used to establish a prior conviction was not altered by the 1942 legislature. This law provides that "The certificates of the warden or other chief officer of any state prison, or of the superintendent or other chief officer of any penitentiary of this state or any other state of the United States, or of any foreign country, under the seal of his office, if he has a seal, containing the name of the person imprisoned, the photograph and the fingerprints of said person as they appear in the records of his office, a statement of the court in which conviction was had, the date and time of sentence, length of time imprisoned and date of discharge from prison or penitentiary, shall be prima facie evidence on the trial of any person for a second or subsequent offense of the imprisonment and of the discharge of such person, either by a pardon or expiration of his sentence as the case may be under the conviction stated and set forth in such certificate." (La. Act 16 of 1928, as amended by La. Act 422 of 1938 [Dart's Crim. Stats. (Supp. 1941) § 712]).

34. La. Act 45 of 1942, § 1.

35. *State v. O'Day*, 191 La. 380, 185 So. 290 (1938).

by that of the state, will support an enhanced penalty for a later conviction of another offense," but this principle is not applicable when the crime denounced by the federal laws is not denounced as a crime by the laws of Louisiana.<sup>36</sup> This recent interpretation is applicable to the new law as this section of the new habitual criminal act is identical with the old law.

The previous habitual criminal act provided that when it was invoked the indeterminate sentence law was not applicable.<sup>37</sup> This provision resulted in many inequalities in sentences, with the habitual criminal not always receiving a sentence which was compatible with the purpose of the habitual criminal and indeterminate sentence laws. Habitual criminals received indeterminate sentences for crimes for which a first offender would receive a flat sentence. These difficulties are eliminated by the new law which provides that all persons, including the habitual criminal, shall receive a sentence for a fixed term of years. The person sentenced as a habitual criminal will be eligible for parole at the expiration of one-third of the sentence imposed.

#### INDETERMINATE SENTENCE

The sentencing provisions of the new Criminal Code allow the judge much discretion in fixing the term of years to be served if the guilty person is incarcerated or granted a suspended sentence. The maximum sentence is fixed by the statute for each crime but in only a few instances is a minimum sentence established. This type of sentencing law, together with the habitual criminal act, makes it possible for the punishment to fit the criminal as well as the crime. Further improvement in this direction is attained when release from imprisonment is not automatic but depends to a certain extent upon the record of the prisoner prior to and during his incarceration.

The indeterminate sentence has been used to adjust the period of imprisonment to the individual prisoner. The purpose of the indeterminate sentence law is to make it possible to release prisoners on parole after a period of incarceration. Rather than commit a criminal to serve a fixed term of years, the basic idea is to sentence him to serve an indefinite period in the penal institution and to permit his release under supervision when his record seems to indicate that the prisoner can carry out his stated resolution to "go straight."

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36. *State v. Vaccaro*, 8 So. (2d) 299 (La. 1942).

37. La. Code of Crim. Proc. of 1928, § 729; La. Act 15 of 1928, § 1 [Dart's Crim. Stats. (1932) § 709].

Louisiana's first indeterminate sentence law, adopted by the state legislature in 1916, has been amended many times. The two most important points, which have been subject to several legislative changes, are the crimes exempted from the provisions of the law and the minimum sentence which can be imposed. The crimes exempted are important, for under the provisions of the old parole law only those prisoners who received an indeterminate sentence could be released on parole. The minimum sentence imposed, of course, determined the time when the prisoner could be released on parole. The act of 1916 provided that all prisoners sentenced to the state penitentiary, or at hard labor, were to receive an indeterminate sentence except life termers, persons convicted of offenses where the maximum penalty did not exceed one year, and "persons convicted of treason, arson, rape, attempt to commit rape, crimes against nature, bank and home-stead officials misusing funds of the depositors, notary publics who are defaulters, train wreckers, kidnapers and dynamiters." The minimum sentence could not be less than the minimum term of imprisonment fixed by the statute under which the person was convicted while the maximum could not be greater than the maximum fixed in the statute.<sup>38</sup>

In 1926 the indeterminate sentence law was amended to provide that the minimum term of the indeterminate sentence could not be less than the minimum term for the crime committed nor more than two-thirds of the maximum sentence imposed and the maximum could not be more than the maximum sentence for the crime for which the prisoner was convicted.<sup>39</sup> The prisoners excluded from indeterminate sentence and consequently from parole were the same as those excluded under the 1916 statute except that the crimes of incest and burglary<sup>40</sup> were also excluded.

When the Code of Criminal Procedure was adopted in 1928 the provisions of the 1926 statute became Article 529 of the code. There was objection to the provision of this law that the mini-

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38. La. Act 123 of 1916.

39. La. Act 222 of 1926.

40. In *State v. Barber*, 167 La. 635, 120 So. 33 (1929), it was held that an indeterminate sentence could not be imposed on conviction for entering a building in the nighttime, without breaking, with intent to steal. The definition of the crime of "burglary" therefore excluded from indeterminate sentence all persons convicted of any of the four degrees of burglary. See *State v. Williams*, 189, La. 179 So. 452 (1938); note particularly dissenting opinion of Chief Justice O'Niell.

Since the crime of burglary was not limited to the common law definition of breaking and entering in the nighttime with intent to commit a felony, the result was that all classes of burglars received a flat rather than an indeterminate sentence.

imum sentence could be as much as two-thirds of the maximum sentence imposed. The objection was based on the contention that the prisoner's rehabilitation would be more effectively brought about if there were a shorter period of incarceration and a longer period of parole. Certainty of punishment was recognized as a more effective deterrent of crime than severity of sentence. The Board of Parole recommended to the legislature that the law be changed.<sup>41</sup> In 1934 the legislature amended Article 529 of the Code of Criminal Procedure to provide that the minimum of the indeterminate sentence could not be more than one-third of the maximum.<sup>42</sup> In 1936 Article 529 was further amended so that the crimes of robbery and "attempt to commit robbery" were excluded from receiving an indeterminate sentence.<sup>43</sup> Prior to the 1942 amendment, Article 529 of the Code of Criminal Procedure provided that the judge was required to impose an "indeterminate sentence" for all crimes except those for which the maximum penalty did not exceed one year,<sup>44</sup> and certain specified offenses.<sup>45</sup> The minimum sentence could not exceed one-third of the maximum sentence imposed. Thus if the maximum sentence imposed was nine years, the minimum sentence could not be more than three years.

Much confusion has been caused by the specified offenses for which an indeterminate sentence was *not* to be imposed. Many persons were given indeterminate sentences, although they were convicted of crimes which excluded them from being eligible to receive such sentences.<sup>46</sup> Since the parole law<sup>47</sup> specifically provided that a parole could not be granted if the trial judge inadvertently or through error imposed an indeterminate sentence which the law did not authorize, the sentence illegally imposed

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41. Report of the Louisiana State Board of Parole (April 30, 1936) 15-16.

42. La. Act 42 of 1934 [Dart's Crim. Stats. (Supp. 1941) § 529].

43. La. Act 98 of 1936 [Dart's Crim. Stats (Supp. 1941) § 529].

44. It was held in *State v. Hood*, 167 La. 863, 120 So. 480 (1929) that this phrase referred to the maximum penalty actually imposed and not to the maximum penalty which might be imposed.

45. The crimes exempted from indeterminate sentence were "treason, arson, rape, attempt to commit rape, crimes against nature, incest, burglary, robbery, attempt to commit robbery, bank and homestead officials misusing funds of depositors, or other funds entrusted to such officials, notaries public who are defaulters, train wreckers, kidnappers and dynamiters." Art 529, La. Code of Crim. Proc. of 1928, as amended by Act 98 of 1936 [Dart's Crim. Stats. (Supp. 1941) § 529].

46. According to the records of the state penitentiary there were 136 prisoners of a total of 3,000 in the penitentiary on April 30, 1940, who were incarcerated under indeterminate sentences but were required to serve the maximum sentence imposed. In other words, a flat sentence rather than indeterminate sentence should have been imposed.

47. La. Act 331 of 1926, § 3 [Dart's Crim. Stats. (1932) § 727]; La. Code of Crim. Proc. of 1928, § 727.

had no binding effect on the administration of the parole statute. Thus such persons committed to the penitentiary were compelled to serve the maximum sentence imposed unless the court would agree to re-sentence the individual. The new parole statute<sup>48</sup> makes parole possible for these prisoners since a parole may be granted when any prisoner has served one-third of the *maximum* sentence.

There were also a number of persons committed to the penitentiary and given flat sentences for crimes which required indeterminate sentences. According to the penitentiary records forty-six prisoners of a total of three thousand in the penitentiary on April 30, 1940, were incarcerated under flat sentences for crimes which required indeterminate sentences. Difficulty resulted from Article 529 listing the crimes of "attempt to commit rape" and "attempt to commit robbery," for there are no such crimes under the Louisiana statutes. The Louisiana Supreme Court held<sup>49</sup> that although there was a crime of "assault with *intent* to commit rape,"<sup>50</sup> there was no such crime as "attempt to commit rape" and therefore an indeterminate sentence was to be imposed for crimes of this kind. Under the provisions of this decision a person convicted of the purported crime of attempt to commit robbery should have received an indeterminate sentence.<sup>51</sup> All such problems are eliminated by the new parole law which provides that *all* prisoners are eligible to be considered for release on parole when they have served one-third of the maximum sentence imposed.<sup>52</sup>

Under the provisions of the previous indeterminate sentence law about forty per cent of the penitentiary population was not eligible for release on parole. These persons could not be released under supervision but were discharged only when they had served their full sentences. Article 529 of the Code of Criminal Procedure was apparently based on the premise that the nature of the offense is an absolute guide to determine fitness for release on parole. The fact is that many persons convicted of burglary or robbery are better parole risks than others convicted of forgery or cattle stealing. Decisions concerning parole eligibility should be based mainly on the characteristics of the criminal rather than upon the crime.

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48. La. Act 44 of 1942.

49. *State v. Jackson*, 8 So. (2d) 285 (La. 1942).

50. La. Rev. Stats. of 1870, § 792, as amended by La. Act 9 of 1912 [Dart's Crim. Stats. (1932) § 766].

51. Opinion of Attorney General (May 11, 1942) re: Vincent Saia.

52. La. Act 44 of 1942.

The importance of the statute amending Article 529 of the Code of Criminal Procedure cannot be overemphasized. That article now provides that a determinate sentence is to be imposed by the court in *all* cases. It provides that "whenever any person is sentenced to imprisonment, after having been found guilty of a crime upon verdict or plea, it shall be the duty of the judge to impose a determinate sentence."<sup>53</sup> This amended article, together with the new parole statute, will have the effect of making release under supervision possible for all inmates of the penitentiary except those who are pardoned or die before being released.

#### PAROLE

The new parole law provides that "a parole shall be ordered only for the best interest of society, not as an award of clemency."<sup>54</sup> This definition makes it clear that although a prisoner may have served sufficient time to be eligible for parole, his release depends upon the judgment of the parole authorities as to whether such action would benefit the prisoner and society. Parole is to be distinguished from a release resulting from the action of the Board of Pardons and, of course, is much different from an outright discharge which occurs when the prisoner has served his sentence.

Parole is frequently confused with probation. The main difference is that parole presupposes a period of incarceration before the prisoner is released under supervision, while the person granted probation is not required to be imprisoned. Probation is granted by the court as a part of the sentence. Parole is granted by a board in the executive branch of government after custody of the prisoner has been turned over to the prison officials.

When a prisoner is released on parole his sentence is not reduced, but the balance of the sentence is served under the supervision of the parole authorities. Release under supervision has many advantages over an outright discharge. A definite plan must be established before the prisoner may be paroled. This plan includes employment, residence and a parole adviser. The parolee must have a job if he is physically able to work. Arrangements are made so that he will have a definite place to live. There must be a parole adviser who has accepted the responsibility for

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53. Art. 529 of the La. Code of Crim. Proc. of 1928 as amended by La. Act 46 of 1942.

54. La. Act 44 of 1942.



assisting the parolee to observe the conditions of his parole.<sup>55</sup> All phases of a proposed parole plan are thoroughly investigated. By means of this pre-parole investigation it is determined that the offer of work is genuine, that it is work which the parolee is capable of doing and that it will not cause him to engage in illegal activities or associate with persons who will encourage further criminal activity.

Parole is a better method of release for all prisoners than an outright discharge since the restraints imposed by years of incarceration are not suddenly removed. Definite conditions are imposed at the time the parole is granted and the parolee may be returned to the penitentiary for violating any of these conditions. It is made clear to the parolee by the conditions imposed that certain types of activity will cause revocation of parole.<sup>56</sup>

The supervision provided to the parolee helps him to make an adjustment after his release. Those prisoners who are handicapped by a physical or mental disability or by the lack of relatives or friends are given aid by the Division of Probation and Parole and the other divisions of the Department of Public Welfare. By means of supervision the parole authorities are assured that the conditions of parole are being observed and that the parolee is not engaging in further criminal activity. If the parolee violates the conditions, the parole may be revoked and the prisoner returned to the penitentiary although he may not have committed a new crime.

#### *Previous Louisiana Parole Laws*

Louisiana has for many years used parole as a method of release from the state penitentiary. The legislature in 1914 authorized the Governor upon the recommendation of the Board of Con-

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55. The previous law (La. Act 331 of 1926 [Dart's Crim. Stats. (1932) §§ 725-734]) required that a "first friend" be secured who in most instances was also the parolee's employer. This practice was previously terminated for in many cases the first friend-employer paid inadequate wages and the parolee could not secure another job because of the fear that his parole would be revoked and he would be returned to the penitentiary. Under the present regulations the adviser may not be the parolee's employer.

The former Board of Parole beginning in October 1938 also required the posting of a "first friend bond" in the sum of \$25 for parolees residing in Louisiana and \$50 for those leaving the state. Although it was claimed (see p. 5 of the Report of the Louisiana State Board of Parole, April 30, 1940) that this unique requirement improved the efficiency of parole supervision, it worked an undue hardship on prisoners unable to secure the money for the bond. This requirement was eliminated prior to January 1, 1941.

56. Some of the general conditions agreed to by the parolee are to remain within the limits of the Certificate of Parole unless permission is granted to go elsewhere, to submit written monthly reports, and to live and work at the place stated in the parole certificate unless the plan is changed.

trol of the state penitentiary to issue a "parole or permit to go at large" to any first offender who had served at least one calendar year of his sentence. Persons convicted of "treason, arson, rape, attempt to commit rape or crimes against nature" were not eligible for parole. It was also provided that every parolee upon being discharged was to be furnished with a "serviceable suit of clothes and transportation to such place as he may elect to go within the State of Louisiana and five dollars in money."<sup>57</sup>

In 1916 a Board of Parole of three persons appointed by the Governor was created. This board had the power to determine when and under what circumstances prisoners were to be paroled. Those prisoners who had received an indeterminate sentence were eligible for release on parole at the expiration of their minimum sentences.<sup>58</sup> The district court was to determine whether the prisoner had violated the conditions of his parole and should be returned to the penitentiary. Since Louisiana did not have an indeterminate sentence law prior to 1916, another statute authorized the newly created Board of Parole to confer the benefit of the indeterminate sentence on prisoners by allowing their release on parole after they had served two years of their sentences. Prisoners who had been convicted of crimes exempted from the indeterminate sentence statute were not eligible for parole under this special law.<sup>59</sup> The legislature in 1918 changed the parole law and provided that the Board of Parole could parole any prisoner who had completed one-fourth of the minimum term of his sentence, but not less than one calendar year and who had by meritorious service and exemplary conduct earned a commutation of sentence.<sup>60</sup>

The basic parole law which was in effect at the time the 1942 legislature convened was passed in 1926. Under this statute the authority for granting parole was vested in a parole board consisting of three persons appointed by the Governor.<sup>61</sup> This board was required to meet once a month. At a one day meeting each month decisions were made on about thirty cases. There was little or no previous opportunity to study and review the cases. The board was required to rely largely upon the recommendation of the two full time employees of the board, a parole officer and an office secretary. It was impossible for one parole officer to

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57. La. Act 149 of 1914.

58. La. Act 125 of 1916.

59. La. Act 124 of 1916.

60. La. Act 24 of 1918.

61. La. Act 331 of 1926 [Dart's Crim. Stats. (1932) §§ 725-734].

investigate thirty cases each month located in all parts of the state and at the same time effectively supervise about five hundred persons who had previously been granted parole.

The laws concerning parole were further complicated when the state legislature adopted the Administrative Code of 1940<sup>62</sup> abolishing the former Board of Parole and transferring its functions to the Department of Public Welfare. As a result of this law the Director of Public Welfare became vested with the legal powers of the former Board of Parole including the authority to grant and revoke paroles. In order to carry on this work the Director of Public Welfare appointed a parole committee consisting of three persons on the staff of the department. This committee was responsible for reviewing all applications for parole and recommending whether parole should be granted or denied. During the time the Department of Public Welfare was responsible for parole, it was the practice of the Director of Public Welfare to rely upon the recommendations of this committee.

#### *Present Law*

Under the 1942 parole law a Board of Parole of three members is created, consisting of the Director of Public Welfare or his representative, the Attorney General or his representative, and the trial judge. The Attorney General or his representative serves as chairman of the Board.<sup>63</sup>

The Board of Parole is an ex-officio group which probably will be satisfactory until the volume of parole decisions increases to the point where a full-time board is needed. It appears that a board consisting of public officials is superior to a part-time board which meets only once a month and is therefore not able to study and analyze the cases as thoroughly as necessary. There is some question as to whether it is practical for the presiding judge to be a member of the board, since it is not possible for the various judges to attend meetings of the Board of Parole. If as many as thirty cases are decided in one day it is obvious that all of the presiding judges could not be present. Further consideration should undoubtedly be given to the membership of the board.

#### *Eligibility for Parole*

The new parole law provides that any person confined in any penal institution in the state may be released on parole after serv-

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62. La. Act 47 of 1940 [Dart's Stats. (1939) § 7789.6 et seq.]. Usually referred to as the "Reorganization Act." This statute was held to be unconstitutional in the case of *Graham v. Jones*, 198 La. 507, 3 So.(2d) 761 (1941).

63. La. Act 44 of 1942, § 1.

ing one-third of the maximum sentence imposed. Credits earned by a prisoner because of good conduct in the penitentiary do not affect the date the prisoner is eligible to be granted a parole.<sup>64</sup>

Since the provisions of the new parole law are extended to all persons who were serving either determinate or indeterminate sentences in the state penitentiary, all inmates will eventually be eligible for parole. Prisoners now in the penitentiary under improper indeterminate sentences or under flat sentences which should have been indeterminate will be eligible for parole since the parole eligibility date is one-third of the maximum sentence. The artificial distinctions based on the nature of the crime are eliminated and decisions in the future can be based on the potentialities of the criminal to adjust if released on parole. The requirement that one-third of the sentence must be served before the prisoner may be paroled is substantially the same as the previous law. The prisoner was formerly eligible for release when he served the minimum sentence imposed and under the provisions of the indeterminate sentence law the minimum could not be more than one-third of the maximum.<sup>65</sup>

Under the new provision of the 1942 parole law first offenders who receive a sentence of five years or less may be paroled before they have served one-third of their sentence. This provision of the law will eliminate the necessity of a long period of incarceration for the young first offender who may have committed a minor felony. Release will be possible just as soon after incarceration as a satisfactory parole plan can be established and the approval of the Board of Parole is secured.

Prisoners who have been sentenced for life may, of course, apply to the State Board of Pardons for a commutation of sentence. If the Board of Pardons commutes the sentence to a fixed term of years and such commutation is approved by the Governor, then the prisoner under the new law may be paroled when he has served one-third of the commuted sentence. This provision is similar to the previous parole statute but eliminates the unworkable requirement that the Board of Pardons and the Governor must approve the commutation of sentence and again ap-

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64. *Id.* at § 2. See subsequent discussion of the good-time law. La Act 50 of 1942.

65. Although the indeterminate sentence law (Art. 529, La. Code of Crim. Proc. of 1928) provided that the minimum sentence could *not* be *more* than one-third of the maximum, it was customary for the minimum to be one-third of the maximum. Unfortunately the new law (La. Act 44 of 1942) did not provide that the prisoner with a minimum sentence of less than one-third of the maximum could be released at the expiration of the minimum sentence.

prove the granting of parole after it is recommended by the Board of Parole.

### *Investigation and Release*

Under the new parole law the Department of Public Welfare is charged with making pre-parole investigations, which include information concerning the circumstances of the prisoner's offense, previous social history and criminal record, and his conduct and attitude in prison.<sup>66</sup> The Division of Probation and Parole of the Department of Public Welfare is responsible for securing this information and presenting the facts to the Board of Parole. The facilities of the welfare office in each parish are used in making pre-parole investigations. After the parole has been granted the Department of Public Welfare is responsible for the supervision of the parolee. This supervision is carried on directly by the Division of Probation and Parole and is not the responsibility of the local welfare offices.

The coordination of the work of the prison authorities with the parole authorities is very important in determining who should be paroled and when release on parole is to be effective. Although a prisoner may not be released until he has served a part of his sentence, it is not mandatory that he be paroled at any particular time. The parole should be granted when there is the best possibility of the prisoner's adjustment after his release. The new law provides that the Department of Public Welfare may station an employee at the state penitentiary for the purpose of cooperating with the penitentiary officials in carrying out the parole act.

Under the provisions of the old parole law the prisoner released received five dollars in cash, a cheap suit of clothes and transportation. Prisoners released outright (other than those released on parole) received ten dollars to pay for transportation and a cheap suit of clothes.<sup>67</sup> Under such a system prisoners were turned loose at the gates of Angola without a job and in many cases without a place to live or a plan of any kind. It is to be expected that after a long period of incarceration adjustment in

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66. By means of La. Act 168 of 1938 [Dart's Crim. Stats. (Supp. 1941) §§ 735.1-735.3] the Louisiana legislature adopted the Uniform Act for Out-of-State Parolee Supervision. Under this law Louisiana is a member of the Inter-state Compact and has agreed not to permit parolees to enter another state until the receiving state has had an opportunity to investigate the case. In the same manner other states which are members of the Compact do not send their parolees to Louisiana without notifying the Department of Public Welfare.

67. This has been the custom at the penitentiary for many years, although there has been no law requiring such payments to be made.

the "free world" will be difficult. Some improvement in the laws has been effected since the parole law now provides that all prisoners released shall receive civilian clothing, transportation to the place of conviction or other place designated by the provisions of the parole, and the sum of twenty dollars if he has served two or more years, or ten dollars if he has served less than two years.<sup>68</sup> A similar provision is made for prisoners not released on parole but released as a result of good conduct credits.<sup>69</sup>

The prisoner's adjustment after release from the penitentiary would be facilitated if he were paid a small amount for the work he performs while incarcerated. (At the present time certain trustees in the penitentiary are paid the sum of one dollar a month for work performed.) With the money he has earned the prisoner would be able to support himself until he receives his first payment for wages.

Provisions of the parole law do not apply to persons committed to the Louisiana Training Institute for Boys at Monroe or the Louisiana State Industrial School for Girls at Pineville. Release from these two institutions is controlled by other statutes.<sup>70</sup> It probably will be found advisable in the near future to give further attention to the handling of prisoners under the age of twenty-one.<sup>71</sup> Unfortunately youths as young as fourteen or fifteen are committed to the state penitentiary. Probably many of these youths should not be incarcerated at all, except for the unusual case in which it is determined that institutionalization for the balance of the individual's life is advisable.

#### *Termination of Parole*

If the parolee violates the conditions of his parole, he may be arrested and detained until the Board of Parole is able to decide whether the parole should be revoked and the parolee returned to the penitentiary. When requested by the parolee, the Board of Parole must provide a hearing to be held within thirty days of the time the request is received. This hearing will give the parolee an opportunity to present facts to show why the parole should not be revoked. The Board of Parole may modify or suspend parole supervision when satisfied that further super-

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68. La. Act 44 of 1942, § 5.

69. La. Act 50 of 1942, § 5.

70. La. Acts 127 and 128 of 1942.

71. See comments in this issue of the Law Review concerning the Youth Correction Authority Act and the Report of the Judges Conference. Book Review (1942) 5 LOUISIANA LAW REVIEW—.

vision is no longer necessary. A final discharge is issued when the parolee has served the maximum sentence originally imposed.<sup>72</sup>

#### INFORMATION CONCERNING PRISONERS COMMITTED

The parole authorities as well as the members of the State Board of Pardons have experienced difficulty in securing adequate information to enable them to make intelligent decisions. Undoubtedly in many cases an application for parole or pardon has been denied because the facts justifying approval were not available and in other cases the parole or pardon was improperly granted because facts justifying a denial were not presented. The Department of Public Welfare during the two years it has been responsible for paroles has partly solved the problem by means of pre-parole investigations. In all cases an investigation of the proposed parole plan has been made.<sup>73</sup> The Governor of the state has also used the facilities of the department in many cases in order to secure additional social information to help decide whether the recommendation of the Board of Pardons should be approved.

The Department of Public Welfare also continued the practice of the former Board of Parole of writing to the trial judge, the district attorney and the sheriff of the parish in which the prisoner was convicted and requesting any facts which they might have, as well as any recommendations they might wish to make. In many instances, however, the judge and district attorney who held office at the time of conviction are not in office at the time the application for parole or pardon is made, or they may not recall clearly a case heard some time ago. For these reasons facts concerning the conviction are not always available.

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72. The laws adopted by the 1942 legislature do not affect the provisions of Act 127 of 1938 which provides that where a District Prison Farm has been established under the authority of Act 203 of 1926 as amended by Act 189 of 1928 [Dart's Crim. Stats. (1932) § 1408] La. Code of Crim. Proc., §§ 1408-1425), the District Judge may sentence any person convicted in the district to the district prison farm. Persons convicted of certain crimes or receiving a sentence of more than five years cannot be committed to the prison farm. The prisoners are entitled to good-time credits and parole in the same manner as prisoners in the state penitentiary.

73. Although not required by law it was formerly necessary under the rules of the Board of Parole that the application for parole be advertised in a newspaper in the parish of conviction. When investigations are not made, such advertising may serve some purpose but the cost is a hardship on the prisoners who have no money. This requirement was eliminated after experience indicated that no information was secured as a result of this advertising. The rules and regulations of the Board of Pardons do, however, require that an application for a pardon or commutation of sentence be advertised in a newspaper of the parish in which the prisoner was convicted.

It is hoped that in the future more adequate information will be available to the parole and pardon authorities under the provisions of Act 47 of 1942. This statute provides that the district attorney shall prepare a statement concerning the facts and circumstances of the crime or offense and the age of the offender as judicially determined.<sup>74</sup> This statement is to be approved by the trial judge, but in those cases in which he does not agree with the district attorney's statement the judge shall prepare and submit a separate statement. It is expected that the facts contained in such statement will be helpful to the penitentiary as well as to the parole and pardon authorities. This act in effect replaces a former provision of Article 529 of the Code of Criminal Procedure which was omitted apparently through oversight when this article was amended by the legislature in 1934.<sup>75</sup> A copy of the indictment, information or affidavit, a copy of the sentence and the name and address of the judge and prosecuting attorney are also to be attached to the order carrying out the sentence of the court.<sup>76</sup>

It is the duty of the clerk of court to send the statement to the warden of the state penitentiary where it is retained in the penitentiary files and provided, when requested, to the Board of Parole, the Board of Pardons, or the Governor. With this information readily accessible more intelligent and equitable decisions can be made concerning applications for parole and pardon.

#### "GOOD-TIME FOR EVERYBODY"

The *Angola Argus*, published by the inmates of the Louisiana State Penitentiary, thus heralded its approval of the new law which revised the former statute<sup>77</sup> by permitting all prisoners to earn a diminution of sentence by good conduct while incarcerated. Under the law prior to 1942 prisoners who were third or subsequent offenders could not earn good-time credits.<sup>78</sup> This provision

74. The provisions of La. Act 168 of 1924 [Dart's Crim. Stats. (1932) § 735] were not changed by the 1942 legislature. It is provided by this law that the Judge shall "establish judicially the age of each defendant before sentence is imposed and to insert same in the commitment." Failure to establish age, however, does not "invalidate any of the proceedings, conviction or sentence in any case."

75. The indeterminate sentence law of 1926 (La. Act 222 of 1926, § 2) provided "that whenever any district judge imposed an indeterminate sentence he shall attach to the judgment carrying out such sentence, a short statement or account, of the crime committed, and a short statement of the character of the person sentenced, in all cases where the minimum sentence is one year or more."

76. Failure to comply with the provisions of the act does not "invalidate the proceedings, conviction, or sentence in any case." La. Act 47 of 1942, § 4.

77. La. Act 311 of 1926 [Dart's Crim. Stats. (1932) §§ 714-722].

78. La. Act 99 of 1932 [Dart's Crim. Stats. (1932) § 717].



of the law was apparently based upon the assumption that multiple offenders should be incarcerated for a longer period of time than first or second offenders. The fallacy in such reasoning lies in the fact that the sentencing judge has taken the defendant's previous record into consideration at the time of imposing sentence and in addition, under the provisions of the habitual criminal act, a more severe sentence must be imposed for the multiple offender.

The primary purpose of "good-time" laws is to aid the prison authorities in maintaining discipline and to reward the industrious prisoner while incarcerated. The idea seems to be that the "good" prisoner because of his conduct should be able to *earn* a release in a shorter period of time than the person who does not behave. It would seem, therefore, that *all* prisoners who are "good" should be allowed to earn a reduction of sentence by their conduct rather than basing good-time upon the previous criminal record. The 1942 act,<sup>79</sup> therefore, provides that all prisoners in the state penitentiary are eligible to earn a diminution of sentence by good conduct.

Louisiana was one of the first states to recognize the possible disciplinary value of good-time deductions. Exactly one hundred years ago the legislature authorized the Board of Inspectors of the penitentiary to remit a small portion of the term of any convict "for the purpose of encouraging exemplary conduct."<sup>80</sup> This law was amended in 1886.<sup>81</sup> Although the law has subsequently been changed on several occasions, the amount of good-time allowed has remained the same since 1886. The good-time statute adopted in 1926 and amended in 1932 was in effect until the new laws passed by the legislature of 1942 became effective.

#### *Effect on Parole*

Although in some states good conduct credits affect the date the prisoner is eligible to be released on parole, allowances for good-time in Louisiana have never affected the parole eligibility date. This means that diminution of sentence because of good conduct is applicable only to those prisoners who are not paroled. Similarly the new law provides that "in determining when any prisoner has served the required one-third of his sentence, no

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79. La. Act 50 of 1942.

80. 1 Attorney General's Survey of Release Procedures (Washington, 1939) 454-456.

81. La. Act 72 of 1886.

diminution of sentence for good behavior shall be considered or allowed."<sup>82</sup>

### *Method of Computation*

Probably the most important change brought about by the new statute is the method of computing good-time. It has been the practice in Louisiana as well as in most other state and federal penal institutions to compute the good-time on the basis of "length of sentence." The new law in Louisiana, however, provides that the "period of service" should be the basis of computation. Under both the old and the new law the prisoner may earn single good-time as follows: two months for each of the first and second years, three months for each of the third and fourth years and four months for each subsequent year. Under previous practice the person sentenced for twelve years had his term "discounted" by giving him single good-time credits of forty-two months, or an allowance for each of the twelve years of his sentence; he could, therefore, be released after serving eight years and six months. The new act specifically provides that good-time is not to be allowed until earned; the credits are allowed not when the prisoner enters the penitentiary, but as earned. A prisoner receiving a twelve year sentence under the new law is eligible for release at the expiration of nine years and six months, for, by serving nine years, he has earned good-time amounting to thirty months.

### *First Offenders*

The provision of the previous statute enabling first offenders to earn "double good-time" is retained in the new law. If the theory of "good-time" is that the prisoner earns it by his behavior then there is no reason why all the inmates of the penitentiary should not be on the same basis. If double or "extra" good-time is allowed it should certainly be based on the prisoner's meritorious conduct and not because of the lack of a previous criminal record. Another provision of the old law requiring the Governor's approval of "double good-time" is also retained. There seems to be no good reason why the action of the warden in such cases should not be final, since the Governor cannot grant good-time unless it is recommended by the warden. The Governor of the state is a busy executive and cannot be expected to have the time to study the cases to determine the advisability of approving the

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82. La. Act 44 of 1942.

recommendations of the warden. He must, therefore, perfunctorily accept the warden's suggestions in almost all cases.

### "Hog-Law"

The 1942 statute eliminates that provision of the old act which was called the "hog-law" by the inmates of the state penitentiary. The old law provided that if the prisoner, released because of his good-time credits, should, during the period between the date of his discharge and the date of the expiration of his full term, be convicted of another felony or misdemeanor, he should, in addition to the penalty imposed for the second offense, be compelled to serve the remainder of the term he would have been compelled to serve for the first offense. This provision of the law created hard cases. In many instances the judge imposing sentence for the second or subsequent offense was not aware of the old sentence which remained to be served. Since the habitual criminal act makes it mandatory that a multiple offender receive a more severe sentence this provision is not needed.

It can well be argued that with an adequate system of release on parole it is not necessary to have a good-time law since the conduct of the prisoner in the penitentiary is one of the factors considered when a decision is made as to whether parole is to be granted. Perhaps the prisoner who is denied parole should be required to serve out the full sentence. It would, however, work a hardship on the prison officials responsible for discipline in the prison if this incentive for good conduct were taken away. Frequently the prisoner denied parole presents the most difficult disciplinary problem but the knowledge that an earlier release because of good conduct is possible encourages him to maintain a good record while in prison.

### PARDON

A review of the laws in Louisiana concerning persons adjudged guilty of crimes would not be complete without giving consideration to the power of pardon. Pardon is one of the most ancient of devices used by the state to ameliorate the mistakes and harshness of the criminal law.<sup>83</sup> Pardon has been defined as an act by which the pardoning authority extends forgiveness to a criminal and excuses him from the penalties imposed by the law.<sup>84</sup>

83. Louisiana's first Constitution of 1812 authorized the Governor to grant pardons with the consent of the Senate. (Art. III, § 11). The 1879 Constitution (Art. 66) substituted the consent of a Board of Pardons for the Senate.

84. Stanley, *Pardons, Paroles and Reprieves* (New Orleans, 1942). Reports of the Louisiana State Bar Association (1935-41) 65-76. (Address given before the Bar Association, Monroe, Louisiana, April 24, 1936).

The extent of the use of pardon apparently depends to a large measure upon the successful operation of other criminal laws. When innocent persons are not found guilty, when sentences imposed are not unduly long in relation to the crime committed, and when other release laws work properly, the responsibilities of the pardoning authority are greatly reduced.

The Louisiana Constitution<sup>85</sup> provides that the Governor may grant pardons, commute sentences and remit fines and forfeitures "upon the recommendation in writing of the Lieutenant Governor, Attorney General and presiding judge of the court before which the conviction was had, or any two of them."<sup>86</sup> The Governor is authorized to grant reprieves for all offenses against the state. It has been held that a reprieve merely postpones the execution of the sentence in order that application for a pardon can be made.<sup>87</sup> In the past extensive use was made of indefinite reprieves<sup>88</sup> and furloughs, but the practice has been discontinued.<sup>89</sup>

It has been suggested that release procedures could be simplified if the Board of Pardons and the Board of Parole were combined as has been done in some states.<sup>90</sup> Under the 1942 law two members of the Board of Pardons (the Attorney General and the presiding judge) are also members of the Board of Parole. The Lieutenant Governor serves as the third member of the Board of Pardons while the Director of Public Welfare is the third member of the Board of Parole. Although the Attorney General and presiding judge are members of both boards, there are sound distinc-

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85. La. Const. of 1921, Art. V, § 10.

86. Very few statutes have been enacted to regulate this "Board of Pardons." The Code of Criminal Procedure adopted in 1928 contained three articles concerning "reprieves and pardons." The wording of Article 572 is exactly the same as Art. V, § 10 of the Constitution; Art. 573 provides that "all sessions of the Board of Pardons shall be public"; while Art. 574 authorizes the Board to adopt "such rules as they deem proper, not contrary to law," and further provides that the Board may not consider an application for pardon until the District Attorney of the parish of conviction is notified and has an opportunity to attend the session of the Board at which the application is considered.

Act 85 of 1873 provided that the pardon granted by the Governor shall have the effect of restoring all civil and political rights, privileges and immunities which the person lost by having been convicted and sentenced. It was further provided by Act 134 of 1928 that the expenses of the members of the Board of Pardons for attending meetings should be paid. (See La. Act 85 of 1873 [Dart's Crim. Stats. (1932) §§ 736-738]).

87. State ex rel. Daniel v. Rose, 29 La. Ann. 755 (1877).

88. La. Act 14 of 1934 (1 E.S.) [Dart's Crim. Stats. (Supp. 1941) §§ 574.1-574.5] extended the prisoner to reprieve, but this law was repealed by La. Act 302 of 1940.

89. 1 Attorney General's Survey of Release Procedures, Digest of Federal and State Laws on Release Procedures (Washington, 1939) 452. See Stanley, loc. cit. supra note 84.

90. 3 Attorney General's Survey of Release Procedures, Pardon, 300-302.

tions between pardon and parole which justify separate boards. The action of the Board of Pardons is in no way final but is merely a recommendation to the Governor.<sup>91</sup> Actions of the Board of Parole are final. A parole is not an act of clemency but the Board of Pardons does grant clemency. A decision concerning pardon or commutation of sentence does not depend upon the prisoner's potentialities for adjustment. Pardon is a legal or quasi-judicial function. Parole is primarily a social service function.

It is not the purpose of parole to take care of the cases in which harsh and unjust action has been taken because of legal technicalities or other reasons. It is the proper function of the pardoning authority to rectify such occurrences since in many cases the court is powerless to act, as for example, when subsequent to conviction new evidence is discovered which clearly establishes the innocence of the convicted person.<sup>92</sup> It is not the function of the parole authorities to determine the validity of the prisoner's cry that he was "framed." Although consideration is given to the circumstances of the crime by the parole authorities, this is done with the purpose of determining whether release on parole would be advantageous to society and the prisoner. It is certainly not the function of the Board of Parole to give the prisoner a new trial, but this in effect is frequently what is done by the pardoning authority. If facilities could be established to enable courts to rectify their own mistakes, perhaps the need for a pardoning authority would not be so great, but under the present legal procedure there is a definite place for a pardon board.

Many of the difficulties of the Board of Pardons have been due to the inadequate performance of the parole laws. It is only natural that more applications will be filed with the Board of Pardons when the parole laws contain arbitrary restrictions or when the administration of parole is not based on fair and equitable principles. If the original sentences imposed by the courts are in accordance with the law and the facts and if the established release procedures operate as they should, the work of the pardoning authority should then be reduced to a minimum.

#### CONCLUSION

The general purpose of the statutes reviewed is to give a person guilty of a crime additional opportunity and incentive to im-

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91. *State ex rel. Pringle v. Lake*, 34 La. Ann. 1069 (1882).

92. *Borchard, Convicting the Innocent* (1932).

prove his conduct. Whereas the previous laws emphasized when and under what circumstances the person is incarcerated, these new laws attempt to deal with the problems of when and under what circumstances the person is released. The substitution of release on parole for outright discharge will give greater protection to society since it is possible to return a person to a penal institution if experience under supervised freedom indicates that the parolee is endangering the community.

All prisoners in the state penal institutions will have a definite reason for abiding by the rules and conducting themselves so as to earn "good-time" and be eligible for release on parole. Those who do not abide by the rules of the penitentiary and of society will be required to serve a longer period of time. Those who show that they can live according to the law may be given the opportunity to earn their own living in the "free world." The habitual offender whose record shows that he has a poor chance of adjusting may upon a fourth felony conviction be removed from society entirely and incarcerated for life.

Although a longer period of incarceration is provided for the recidivist, a method is created for assisting those individuals who indicate a definite intention and ability to adjust to society without further violations of the law. These new laws will enable the courts to administer the law so that the guilty defendant will be incarcerated for a term commensurate with the crime for which he has been convicted.

Although the laws adopted by the state legislature in 1942 represent a definite improvement over the previous laws, further changes will probably have to be made to achieve the fundamental purposes of the criminal laws. Consideration might well be given to the following points in order to improve society's method of dealing with the criminal.

(1) The use of suspended sentence should be extended so that it will be possible to place more offenders on probation when it is indicated that justice can be obtained and society will be protected without incarcerating the guilty person.

(2) The laws regulating jails and prisons should be revamped to the end that prisoners who are incarcerated will be prepared to avoid further criminal activity after their release. Further attention could well be given to what happens to the prisoner during the time when he is incarcerated. Adequate medical and educational resources in the prisons are essential if the prisoner is to

be in a better position upon his release to avoid criminal activity.<sup>93</sup>

(3) Further analysis is needed of the method of determining whether a guilty defendant should be incarcerated, the period of incarceration and the time of release. Perhaps this is not a proper judicial function, but could be better performed by a board or some other instrumentality in the executive branch of government.<sup>94</sup>

(4) Better methods of determining what persons should be imprisoned for long periods of time should be developed so that the treatment of these persons will be different from that for persons who will be incarcerated for only a short time.

(5) Improvement in reporting criminal statistics is needed so that future law makers will more clearly understand the problems with which they are confronted.

(6) Further coordination is needed between the police investigatory work performed by the sheriff, local or state police officers and district attorney, and the social investigations necessary for the administration of probation laws, penal institutions, parole and pardon.

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93. See *The Penitentiary Hospital and the Health Situation at Angola* by Dr. Myron A. Walker, Medical Director and Chief Surgeon, Louisiana State Penitentiary. (Mimeographed. Issued by the penitentiary, Angola, Louisiana, 1942).

94. See Glueck, *op. cit.* note 3, at 225 et seq.